Paper 3

A Bill of Rights: do we need one or have we already got one?

The Bill of Rights debate is back on the political agenda, but not as we have known it before. For the first time there is all-party agreement on some kind of Bill of Rights for the UK. David Cameron has committed the Tory Party to "work towards" a "British Bill of Rights.[1]" The Government has belatedly begun to defend the "benefits which the Human Rights Act (HRA) has given ordinary people[2]" and the Liberal Democrats supported the incorporation of the European Convention on Human Rights (ECHR) into UK law decades before Labour did.

The only argument now is what kind of bill of rights? In other words, should the HRA be defended as Britain's bill of rights by any other name, based on "a single clear catalogue of … rights and freedoms" shared across Europe, as the Lord Chancellor has described it[3]? Or should a 'home-grown' Bill of Rights replace the HRA as David Cameron has suggested? Alternatively could a British Bill of Rights build on the ECHR as the Labour Party once advocated before it took power[4] and it is rumoured Gordon Brown may now be considering?[5] These are no longer purely constitutional questions, of interest only to an informed elite. They feed into a national preoccupation with the appropriate balance between liberty and security that has come to dominate the era in which we now live.

Backstory.

Not since Tom Paine wrote *Rights of Man* in 1791 has so much national attention focussed on fundamental rights and how to protect them. Published amidst mounting panic by the British government that the French Revolution would prove contagious, Paine's best seller called on the state to secure fundamental social rights as well as refrain from abusing individual liberties.

---

[1] *Speech* to Centre for Policy Studies, 26 June 2006.
[2] *Review of the Implementation of the Human Rights Act,* Department of Constitutional Affairs, July 2006, p7.
[3] Ibid, Lord Falconer, p6.
[4] *A new Agenda for Democracy: Labour's proposals for constitutional reform,* NEC, 1993
[5] See, for example, Andrew Grice, *Tory Leader is stealing Brown's best tunes,* Independent, 30.9.06.

In his day, Paine electrified political debate in Britain. Within two years about a quarter of a million copies of *Rights of Man* were sold in a population of ten million.

Over the next 150 years the radical rights movement that Paine represented was buffeted from all sides. By the twentieth century he was eclipsed as a leading thinker of the labour movement by social democrats and Marxists[6] who championed public ownership over constitutional reform and collective bargaining over individual rights.

Interest in bills of rights remained largely dormant until 1968 when the Wilson government introduced the Commonwealth Immigrants Act. Passed in only three days amidst a tabloid frenzy, the Act prevented British Asians expelled from East Africa from entering the UK. This was a Labour government using its parliamentary majority to ride roughshod over the rights of a minority. The expelled East African Asians were eventually vindicated by the European Court of Human Rights in Strasbourg. But the ECHR was not enforceable in the domestic courts. Without a bill of rights or written constitution to turn to, British democracy offered these citizens virtually no protection.

The bulk of the Tory and Labour parties remained un-persuaded about the benefits of constitutional reform[7]. Conservative opinion tended to dismiss bills of rights as lethal for the doctrine of 'parliamentary sovereignty,'[8] resisting virtually any restraints on the 'will of the legislature.' The idea that certain values are so fundamental to democracy that they should receive special protection, was deemed almost alien to Britain's political traditions[9].

Opposition to bills of rights within the Labour party was more political than constitutional, although it had the same consequence. The spectre of public school educated judges overturning laws passed by a democratically elected,

---

[6] Marx famously mocked Paine's "so-called rights of man" in *On the Jewish Question,* 1843.

[7] Exceptions included Roy Jenkins, Shirley Williams, Sir Keith Joseph, Sir Michael Havers, Leon Brittain and Lord Hailsham.

[8] The doctrine of 'parliamentary sovereignty' hailed from the first British Bill of Rights in 1689 which is less a bill of rights for 'the people' and more a set of protections for peers and MPs. The essential component of the doctrine is that one parliament should not bind its successor.

[9] Bills of rights are sometimes known as 'higher laws' in that all other laws, whenever passed, are supposed to confirm with their broad principles or be reinterpreted or repealed.

centre left government hung over the debate[10]. Support for a UK bill of rights remained largely the preserve of lawyers and liberals (with a lower and upper case L).

A growing perception amongst opinion formers and some leading politicians that the British political system amounted to an 'elective dictatorship,'[11] kept the bill of rights debate on the boil. Hidden within Margaret Thatcher's 1979 election manifesto was the promise of all-party discussions on a bill of rights. Once in power this commitment was air brushed away. But it was 18 years of Conservative rule that was to turn the tide in the Labour Party in favour of constitutional reform.

The reputation of the legislature as a bulwark against the government sunk to (what was then) an all time low. Parliamentary sovereignty was exposed as executive sovereignty in all but name. From the poll tax to the *Spycathcher* ban, the Conservatives enacted any measures they wished, on a minority of the popular vote. Then, as now, judges gained the reputation for being the only effective opposition to the government as they developed their own powers of judicial review, much to the frustration of the Tory government[12].

When the late Labour leader, John Smith, committed the Labour Party to a British Bill of Rights in February 1993, it was as part of a package of proposals to "restore democracy to our people." Echoing the sentiments of the former Conservative Lord Chancellor, Lord Hailsham, 18 years earlier, he bemoaned that "what we have in this country at the moment is not real democracy; it is elective dictatorship".[13]

Smith concluded that "the quickest and simplest way" of introducing "a substantial package of human rights" would be to pass a Human Rights Act

---

[10] The first Labour Party document to propose the incorporation of the ECHR into UK law, *A Charter of Human Rights,* was published in 1976. The National Executive Committee (NEC) would not allow the paper to be presented as official policy; only as an issue for debate.

[11] It was Lord Hailsham, former Conservative Lord Chancellor, who gave this phrase currency in a stinging critique of the British constitution in the *Dimbleby Lecture,* 1976. He pledged support for a written constitution and bill of rights based on the ECHR.

[12] Judicial review of executive acts and decisions grew significantly from 491 cases in 1980 to 2,439 in 1992. The eminent Guardian journalist, Hugo Young, wrote in April 1992 "For Thatcherite Whitehall, the judges were a curse."

[13] "A New Way Forward," *Speech,* John Smith, Leader of the Labour Party, Bournemouth, 7 February 1993.

"incorporating into British law the European Convention on Human Rights,"[14] completing the process that began in 1951 with the ratification of the ECHR[15]. The 1993 Labour Conference adopted an NEC Statement, introduced by home affairs spokesperson, Tony Blair, supporting an all-party Commission to "draft our own Bill of Rights," following the incorporation of the ECHR into UK law[16].

After John Smith's untimely death Labour's commitment to constitutional reform was recognised as one of his strongest legacies. Tony Blair pledged to introduce a bill of rights as part of a package of "democratic renewal" in his 1994 campaign literature for party leader. The new shadow Home Secretary, Jack Straw, committed Labour to a "two stage process." The incorporation of the ECHR into UK law would be followed by "the establishment of our own British Bill of Rights.[17]" The 1997 manifesto reflected the first part of this commitment and the Human Rights Act was introduced the following year.

The HRA: What Went Right, What Went Wrong?

The cracks in the new government's approach to constitutional reform soon became apparent. John Smith's manifesto for a 'citizen's democracy,' which he had "wanted to make the hallmark of the next Labour Government[18]" gave way to a set of significant, but piecemeal, reforms; their relationship to invigorating democracy increasingly opaque.

If the world hadn't shifted on its axis after 11 September 2001 –less than a year after the HRA came into force – it may well have bedded down to become an accepted part of the legal and constitutional landscape of the UK. Many of the early predictions about clogged up courts and a new litigious culture did not materialise, at least not as a consequence of the HRA. Early research by the Lord Chancellor's Department,[19] indicated that very few

---

[14] *A Citizen's Democracy,* Charter 88, March 1993. The IPPR published *A British Bill of Rights* in 1990 drafted by Anthony Lester QC and others based on the ECHR and the UN's International Covenant on Civil and Political Rights.

[15] It was the Atlee government that ratified the ECHR in 1951 and the Wilson government in 1966 that granted individuals the right to directly petition the European Court of Human Rights in Strasbourg.

[16] *A new Agenda for Democracy: Labour's proposals for constitutional reform,* NEC, 1993.

[17] *Speech,* Community Links, November 1995.

[18] Elizabeth Smith, *Introduction, A Citizen's Democracy,* March 1993.

[19] Now the Department for Constitutional Affairs (DCA).

cases were wholly reliant on the HRA.[20] Then, as now, the HRA is mainly cited as a defence in criminal trials or as an additional argument in judicial reviews or civil cases.

But after the shocking events of 9/11, the Prime Minister and the new Home Secretary, David Blunkett, rapidly came to the see the HRA as an obstacle in the so-called 'war on terror.[21]' In particular, they became frustrated that judges would not deport foreign suspects to countries where there was a real risk they may be tortured, including those accused of involvement in international terrorism[22]. This was blamed on the HRA although the government was bound to comply with this European Court of Human Rights interpretation of ECHR Article 3, prohibiting torture, before Labour came to power[23]. Regardless of the HRA, this mandate would still apply[24].

But many other controversial policies, from the introduction of ASBOS to the retention of DNA, were found to be compatible with the HRA. The assumption that the Act would usher in a new era of rampant libertarianism - based on a 'black letter' (or liturgical) reading of the ECHR – was not substantiated.[25] The courts put down an early marker that, "inherent in the whole of the Convention," is "a search for balance between the rights of the

---

[20] See Raine and Walker, 'The Impact on the Courts and the Administration of Justice of the Human Rights Act 1998', October 2002, which found relatively limited impact of the HRA on the courts in terms of challenges and additional workload, although it had invoked a number of significant policy and practice changes and was felt to be engendering a stronger human rights culture within the courts.

[21] A phrase coined by the American President, George Bush, in the wake of 9/11.

[22] Contrary to some media reports, the ECHR does not prohibit all deportations to particular countries but requires the courts to protect individuals where there is evidence they personally face torture if they are returned.

[23] *Chahal v UK* (1996) 23 EHRR 413 which built on the case law in *Soering v UK* (1989) 11 EHRR 439. In times of national emergency states can usually 'derogate' from most provisions of the ECHR but this excludes the prohibition on torture. This is why the government cannot legislate to require the courts to take national security considerations into account when adjudicating on deportations to countries where the courts judge there is a real risk that an individual deportee may be tortured or subject to the death penalty. The government is trying to persuade the European Court of Human Rights to change this interpretation of Article 3 by intervening in a Dutch case, *Ramzy v Netherlands*. It is also seeking 'memoranda of understanding' with certain states that they will not torture named suspects if they are deported.

[24] When the government introduced legislation to indefinitely detain, without charge, the foreign suspects it could not deport, the House of Lords declared this to be a disproportionate breach of the HRA in that there was no evidence that the threat to national security was from non-British nationals alone; a prescient observation as it turned out (*A v Secretary of State for the Home Department* [2004] UKHL 56). In response, the government introduced 'control orders' to severely inhibit the movement of British and foreign suspects alike and has subsequently detained many of the original suspects again, this time with a view to deporting them.

[25] An early example was *Brown v Procurator Fiscal and Advocate General for Scotland* [2001] 2 WLR 817 which found that the submission in trials of self-incriminating evidence by car owners was compatible with the HRA provided the trial as a whole was fair. This is currently being appealed at the European Court of Human Rights.

individual and the wider rights of the society…neither enjoying an absolute right to prevail over the other[26]."

The Lord Chief Justice, Lord Phillips, recently described the HRA as "an important and successful part of the legal structure. [27]" This followed the (largely) clean bill of health given to the Act in July 2006 by both the Home Office and Department for Constitutional Affairs (DCA) in reviews initiated by the Prime Minister and overseen by the Home Secretary and Lord Chancellor respectively. The Home Office concluded that the HRA represents a "powerful framework" to deliver " a commonsense balance between the rights of individuals and the rights of victims and communities to be protected against harm."[28].

The DCA report claimed the HRA "has had a significant, but beneficial effect upon the development of policy.[29]" Although further training and guidance are necessary, the HRA "framework," promotes "greater personalisation and therefore better services.[30]"

Certainly many individuals and groups can testify to tangible benefits from the HRA in their every day lives[31]. Widely respected organisations like the Disability Rights Commission and Help the Aged have embraced the HRA and campaigned for an extension of its scope[32]. They cite the benefit of human rights values like dignity and respect to thousands of people for

---

[26] Lord Bingham, *Leeds City Council v Price and others* [2006] UKHL 10 at para 32. See also *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35; *Soering v UK* 1989. The exception to this search for 'balance' are the rights to be free from torture and slavery which are neither qualified nor limited under the ECHR.

[27] Interview, *The Observer,* 8.10.06.

[28] *Rebalancing the Criminal Justice System,* July 2006, p4.

[29] Note 2, p19.

[30] Ibid, p21.

[31] Examples include the following: Two disabled women challenged a local authority policy prohibiting care staff from manual lifting. As a result the council amended its Safety Code of Practice on Manual Handling to include consideration of the dignity and rights of those being lifted (*R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin)). Following the murder of a prisoner by his racist cell-mate and a successful challenge under the HRA for a public enquiry, the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks (*R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51). Discrimination against post-operative transsexuals in obtaining marriage certificates was challenged and a declaration was made that s.11(c) of the Matrimonial Causes Act 1973 was incompatible with the ECHR (*Bellinger v Bellinger* [2003] UKHL 21). The Gender Recognition Act 2004 was introduced and entitled a transsexual person to be treated in their acquired gender for all purposes, including marriage.

[32] To cover private and voluntary care and nursing provision.

whom anti-discrimination legislation on its own provides insufficient protection. [33].

Speaking at the LSE after the publication of the Review in September 2006, the Lord Chancellor urged: "Now is the time to stand up for human rights" for "in a whole range of unsung areas the Act has improved the lot of those who deserve help [34]"

Yet considerable damage had already been done to the perception of the Act. The tabloid onslaught against the HRA[35] has been relentless, fuelled by a combination of Euroscepticism[36] and apocryphal stories which ministers showed little or no appetite to rebut until recently.[37] After the 2005 London bombings in particular, the Prime Minister sometimes sounded like a cheer-leader for this negative spin, threatening to "amend the Human Rights Act in respect of the interpretation of the ECHR.[38]"

Much of this is reminiscent of the media frenzy which accompanied the introduction of race and sex discrimination legislation in the 1970s. In simple terms, stories about 'politically correct' legislation that benefit the 'undeserving' at the expense of the 'average British citizen' sell copy. The absence of a statutory champion, like the CRE or EOC, and the lack of consistent political leadership on the purpose and benefits of the HRA, have taken their toll. Time will tell whether the new Commission for Equality and Human Rights (CEHR), the first British statutory body charged with promoting the values in the HRA, will succeed in rehabilitating it[39].

---

[33] An illustration of the difference between anti-discrimination and human rights law was provided by the case of Nadia Eweida in November 2006 who was prohibited from wearing a small crucifix by her employers, British Airways, who maintained that no discrimination between faiths had occurred. This did not satisfy Ms Eweida who was effectively seeking to exercise her human right to manifest her religion. The fact that others in a comparable situation would be treated similarly was no consolation to her.

[34] *Speech* to Human Rights Lawyers Association, LSE, 26 September 2006.

[35] Not all tabloids; the *Daily Mirror* has been largely supportive of the HRA

[36] This largely comprises the wilful misconception that the ECHR is a creature of the EU rather than the post-war Council of Europe, comprising 46 states across the whole of Europe, all of which have ratified the ECHR and incorporated it into their domestic law.

[37] The DCA Review (note 2) distinguishes between urban myths, rumours and partial reporting which leave the impression that a claim which fails at its first hurdle is successful e.g. Dennis Nelsen's bid to receive pornography in his prison cell, which was dismissed at the permission stage, meaning it wasn't even heard by a full hearing.

[38] Prime Minster's statement on anti-terror measures, Press Conference, 5 August 2005.

[39] The CEHR, due to operate from October 2007, will have a duty to clarify and promote the values in the HRA to both officials and the wider public. It is also mandated to champion the importance of human rights in general, like human rights commissions throughout the world. There will also be a separate Human Rights Commission for Scotland.

Can the HRA act in lieu of a Bill of Rights?

Soon after Labour came to power it became clear that ministers had lost any appetite they might have once have had for building on the HRA with a 'second stage' bill of rights[40].

Yet largely because the 'bill of rights debate' provided the original impetus for the HRA, it was designed to be far more than an incorporated treaty. As the 'second stage commitment' receded, so there was a push to draft the HRA 'in lieu' of a bill of rights. The Home Secretary Jack Straw conceded this when it came into force in October 2000, describing the HRA as "the first Bill of Rights this country has seen for three centuries.[41]"

In legal and constitutional terms most of the salient features of bills of rights are present in the HRA. First, like most post-war bills of rights, it is drawn from the broad, ethical values enshrined in the post-war Universal Declaration of Human Rights that are aimed at establishing a fair and tolerant society.[42] Most HRA rights can be legitimately, and proportionately, limited to protect other rights or interests. The HRA has to be interpreted purposefully, rather than literally. In this sense it is a different species from the technical, 'black letter' law characteristic of most British statutes. This is one of the reasons why the tabloids so often get it wrong when they invent stories based on literal interpretations of its provisions .

Second, the HRA provides individuals with a set of fairly simple, written rights which they can use to hold public authorities to account, inside or outside the courtroom. Remedies are available, at the discretion of the courts, where unjustified breaches occur.

Third, British courts can develop their own interpretation of the broad values in the HRA, provided this does not 'weaken' the protection afforded by the ECHR[43]. Contrary to misleading statements by the Leader of the

---

[40] A commitment to do so for Northern Ireland was included in the 1998 Good Friday agreement but has so far failed to materialise, despite the best efforts of the Northern Ireland Human Rights Commission.

[41] *Speech,* IPPR, 13 January 2000.

[42] The 1948 UDHR was a direct response to the horrors of the Holocaust and Wold War Two.The ECHR gives legal expression to most of the civil and political rights in the UDHR, as its preamble makes clear.

[43] HRA s2. Recently, however, the courts have started to interpret this section as if it required the courts to stay within the confines of the case law of the Strasbourg court. See *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 and *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327. This was not the original intention behind the HRA, one of whose stated aims was to influence

Conservative Party[44], Judges are required to "take account of" the European Court case-law, but are not bound by it. Amendments tabled by the Tories, but rejected by the Government, during the passage of the HRA were aimed at tying the domestic courts to Strasbourg jurisprudence. As Edward Leigh MP observed, without such a mandate " we are in danger of not simply incorporating the convention in our law but going much further. What we are creating is an entirely new bill of rights.[45]"

Most importantly, the HRA, like all bills of rights, is effectively a 'higher law' to which virtually all other law and policy must conform where 'possible.' The 'possible' relates to the prohibition on striking down statutes; parliament still has the final say [46]. Instead, Judges can declare Acts incompatible with the HRA, but it is a decision for parliament, or more realistically government, whether, and if so how, to respond [47].

This so-called 'dialogue model' was introduced to address criticisms of bills of rights within the Labour Party [48]. The point was to give parliament a primary role as the custodian of fundamental human rights. Jack Straw emphasised from the outset that higher courts "could make a Declaration [of Incompatibility] that, subsequently, Ministers propose and Parliament

---

Strasbourg jurisprudence via the interpretations that might be put on it by British courts, a development which has started to occur in practice.

[44] In his speech declaring his intention to support a British Bill of Rights, David Cameron wrote that the HRA "makes things worse in that it obliges British courts to base their judgments on the ECHR and [its] case law…giving them no scope to develop their own principles." *British Bill of Rights,* Centre for Policy Studies, 26.6.06.

[45] 313 HC 398 (3 June, 1998).

[46] Liberty's draft bill of rights, *A People's Charter* published in 1991, proposed such an approach. This was developed further in unpublished papers on the HRA that I drafted for the Home Secretary in 1997 at the Human Rights Incorporation Project, King's College Law School, London.

[47] At the time of writing, there have been 21 Declarations of Incompatibility by the higher courts since the HRA came into force in 2000 of which 15 are still standing and 6 have been overturned on appeal. However if a court or tribunal finds that a provision in an Act of the Scottish Parliament is incompatible with Convention rights, it will be able to strike it down as ultra vires. The Australian Capital Territory and the state of Victoria have both recently passed Human Rights Acts explicitly based on the UK model.

[48] Describing the intention behind the HRA, Jack Straw said "Parliament and the judiciary must engage in a serious *dialogue* about the operation and development of the rights in the Bill…this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens." (314 HC 1141 4 June 1998). See also Francesca Klug, "The Long Road to Human Rights Compliance," *Northern Ireland Legal Quarterly, Special Issue: Human Rights and Equality,* Vol 57, No 1, Spring 2006. The former Lord Chancellor, Lord Irvine, described the HRA as a "new and dynamic co-operative endeavour…between the Executive, the Judiciary and Parliament…in which each works in its *respective constitutional sphere*". *Lecture,* Durham Human Rights Centre, November 2002.

accepts, should *not* be accepted."[49] The example he gave was abortion law, but he might have added fox hunting bans, gun control and election expenditure limits[50]; issues more appropriately considered by democratically elected MPs than judges, working within a human rights framework[51].

Should the HRA be replaced by a British Bill of Rights?

Bills of rights are not just legal and constitutional documents, however. They have a symbolic role in highlighting the fundamental values that signify what a country stands for. They can act as a baseline of common principles in a diverse society.

Assessed against this criteria, the HRA has clearly failed to past muster. The reality is that it has never been sufficiently 'owned' by British people as truly 'theirs.' The absence of prior consultation[52], and the adoption of a European human rights treaty wholesale, has reduced the likelihood of the HRA ever reaching the iconic status of the American or South African bills of rights[53].

This was David Cameron's point when he argued that we need "a modern British Bill of Rights to define the core values which give us our identity as a free nation.[54]" The Conservatives propose to scrap the HRA whilst remaining signed up to the ECHR, an approach Cameron confirmed at his first conference as Party Leader[55].

---

[49] 317 HC 1301 (21 October 1998). My emphasis. Lord Hope, confirmed this in the case of *R v Shayler* [2002] UKHL 11 at para 53 when he said decisions as to "*whether* [offending legislation] should be amended…must be left to Parliament." My emphasis.

[50] Constitutionally speaking, there was no obligation on the government to comply with the Belmarsh indefinite detention ruling either (see note 23) although realistically the European Court of Human Rights was likely to take a similar approach to the domestic courts on this issue.

[51] It cannot be assumed that the European Court of Human Rights will always take the same view as the domestic courts that an Act of Parliament breaches Convention rights. Where there is no 'human rights consensus,' the Strasbourg Court is likely to affirm the right of national authorities – parliaments as well as courts – to use their own discretion to determine where the balance of rights should lie. This is known as the 'doctrine of a margin of appreciation' to national authorities and can also be applied to national security issues where there is no European-wide consensus.

[52] In contrast to the years of local, as well as national, public consultation that preceded bills of rights in Canada, New Zealand and South Africa in the 1980s and 1990s, there was no prior consultation in the UK beyond the publication of *Bringing Rights Home: Labour's plan to incorporate the European Convention on Human Rights into UK law,* Jack Straw and Paul Boateng, Labour Party, December 1996.

[53] Or even the Canadian Charter of Rights and Freedoms, which is also partly based on an international treaty, the UN's International Covenant on Civil and Political Rights that draws heavily on the Universal Declaration of Human Rights, as does the ECHR.

[54] See Note 43.

[55] *Speech*, Conservative Party Conference, September 2006.

Commentators of various political persuasions have questioned the 'constitutional literacy' of this package[56]. Ken Clarke, chair of the Conservative Party's Democracy Task Force, described it as "xenophobic" and "legal nonsense"[57].

Is this fair? Legally and constitutionally, the Conservative package *does* seem confused. Were a British Bill of Rights to be weaker or more qualified than the ECHR, the UK government would fall foul of the Strasbourg court with increasing regularity[58]. If, to avoid this, the Bill of Rights were broadly similar to the ECHR, the domestic courts would strive to iron out any differences by interpreting it to comply with the Convention whenever they can, as happens elsewhere in Europe.

Cameron's main pitch was that a home-grown Bill would encourage the European Court of Human Rights to back off and interfere less with "British parliamentary sovereignty." This is simply wrong. The suggestion that a less broad, more 'specific,' bill of rights will 'protect' the UK from Strasbourg is a misreading of the Court's 'margin of appreciation' doctrine[59], as evidence from countries like France or Germany clearly demonstrates[60]. A domestic bill will provide no get out clause from the absolute prohibition on torture[61]. Yet Cameron has subsequently declared this goal to be the main purpose of repealing the HRA[62].

---

[56] See, for e.g. Mary Ann Sieghart, *The Times,* 30.6.06; Vernon Bogdanor, *Guardian,* 1.7.06.

[57] Quoted in *Guardian* 29.6.06.

[58] This would be a reversal of recent years. The number of violations involving the British government has fallen since the effect of the HRA started to bite. See DCA review, note 2, at p4. The number of cases where at least one violation of the ECHR was found has fallen from 30 in 2002, when pre-HRA cases were still being heard, to 15 in 2005.

[59] Cameron seems to have confused the Strasbourg's court 'doctrine of a margin of appreciation,' which applies when there is no European consensus on what minimum standards consist of, with the concept of subsidiarity, an EU term for retaining national 'independence,' not applicable to notions of fundamental, universal human rights. See note 50.

[60] In Germany, for example, the ECHR has the rank of a statute over which the constitution is supreme. However, the European Court of Human Rights does not apply the margin of appreciation any differently to Germany than any other state

[61] As we have seen, there are many areas where the European Court of Human Rights accepts that domestic courts are best placed to use their 'own discretion,' provided this does not weaken the baseline protection provided by the ECHR; but torture is not one of them. Alongside slavery it is one of the only rights to receive absolute and unqualified protection under the ECHR.

[62] Cameron wrote in the *Sunday Times* on 12 November 2006, "It is time to replace the Human Rights Act with a British bill of rights that will enable ministers to act within the law to protect our society. If M15 tells the government that a foreign national is …a danger to national security, then the home secretary should be free to balance the rights of the suspect with the rights of society …and proceed with the deportation if necessary."

As for the charge of Xenophobia, the pledge to replace the HRA with " a clear articulation of citizen's rights that British people can use in British courts" has to be taken seriously.[63] The reference to 'Britishness' appears to extend beyond including rights with a traditional British pedigree[64].

The underlying philosophy of human rights is, of course, that every human being is entitled to fundamental rights simply because they are human. The human rights treaties drafted in response to the horrors of the second world were an early recognition of a shrinking world (or globalisation as we now call it). British citizens who live and travel abroad protest if they are not treated according to internationally recognised standards. Whilst voting rights and many benefits are usually dependent on citizenship or residence, most of the fundamental rights in democratic bills of rights apply to everyone within the jurisdiction of a state. The Bush government built the Guantanamo detention centre for foreign nationals to bypass the natural justice protections of the American Constitution. The Conservative package hints at a Bill of Rights that would exclude non-citizens from the outset.

Once subjected to deeper scrutiny, these proposals may well unravel as unworkable and illogical. But if they makes it into the Tory manifesto un-amended, and a Conservative government takes power, the most probable scenario would be swift repeal of the HRA whilst consultation on a Bill of Rights becomes mired in dispute and delay.[65]

What is to be done?

The immediate effect of the Tory proposals on the Labour administration was to galvanise senior ministers, including the Prime Minister, into belatedly defending the HRA and claiming that an additional bill of rights would be "a recipe for confusion, not clarity.[66]"

---

[63] Note 43.
[64] Like jury trial or
[65] Particularly once it becomes clear that the government is still bound to respect the absolute prohibition on torture in ECHR Article 3,including deporting non-British nationals to states where there is a real risk they may be tortured, which will apply as long as the UK remains a signatory of the ECHR.
[66] Lord Chancellor, Lord Falconer, *Radio 4,* 26 June 2006.

This is disingenuous. All 46 members of the Council of Europe have incorporated the ECHR into their law, through one means or another[67]. At least 21 of these have their own bill of rights or written constitutions, enshrining fundamental freedoms. Confusion is avoided by the national courts interpreting their domestic Bills to broadly conform with the Strasbourg case law which has only very occasionally proved difficult or controversial[68]. The argument that a domestic Bill of Rights, alongside the HRA, is necessarily confusing does not stand up to scrutiny. The claim that introducing a Bill of Rights necessitates the repeal of the HRA is nonsense.

So what are the choices for a future Prime Minister committed to democratic renewal and constitutional reform?

One option is to reinvigorate the Government's belated efforts to defend the HRA by championing it as the landmark measure it was intended to be; Britain's bill of rights in all but name[69]. Despite the relentless tabloid bashing inflicted on the HRA, a YouGov Survey commissioned by the Disability Rights Commission in June 2006 found that 62% of respondents thought it was good to have an Act to protect everyone's rights, although ignorance of what is in the HRA was profound[70].

Opinion polls indicate that bills of rights are popular in principle. Support for a bill of rights, at nearly 80%, has remained fairly consistent over the last 15 years according to the ICM 'State of the Nation' polls[71].What these findings also suggest is that even if the HRA can fairly be described as a Bill of Rights, most people in the UK are ignorant of the fact.

At one level it is extraordinary that the Government is in danger of being upstaged by the Opposition on the introduction of a bill of rights, when the former has already effectively introduced one. If the government has received virtually no credit for doing so, this stems from its own actions. The

---

[67] In states with a monist tradition, the rights in the Convention can be applied by domestic courts on ratification. In states with a dualist approach to international law, like the UK, the substantive rights must be incorporated by statute to become applicable in domestic law.

[68] See the German *Gorgulu* case, Decision of the Federal Constitutional Court, 2 BvR 1481/04.

[69] See Note 40. Jack Straw once described the HRA as "one of the most important pieces of constitutional legislation the UK has seen," *Press Release,* 18.5.99.

[70] 70% of respondents could not name three of their rights.

[71] In 1991 79% thought their rights would be better protected if written in a single document. By 2006 77% agreed strongly or slightly that Britain needs a Bill of Rights to protect the liberty of individuals, with only 6% disagreeing. However some of the rights attracting strongest support in 2006 are not included in the HRA such as right to a fair trial by jury and free hospital treatment.

more disenchanted the government became with the HRA, the more the Act was presented as an entirely technical measure to "bring rights home"[72] and avoid queues at the European Court of Human Rights. It was as if the Government hoped that the more it played down the Act's significance, the less effect it would have. Far from being promoted as Britain's bill of rights, enshrining values like free speech and a fair trial that have long been associated with these islands, the HRA has sometimes appeared more like an elaborate European directive!

Yet without the HRA it is highly unlikely there would now be all-party support for some kind of catalogue of written rights[73].The Conservative support for a bill of rights opens up the opportunity to consult on additional rights that might supplement the HRA to create a distinctively British Bill of Rights, as Labour had originally envisaged[74]. An inclusive and deliberative process could, ironically, rehabilitate the HRA more successfully than any campaign, by clarifying the rights it *already* enshrines and its purpose and relevance to everyone in the UK.

The Tories have suggested a British bill of rights should include issues like data protection which is inadequately protected by the HRA, or jury trial which is absent from it[75]. Their list is not large because the HRA includes all the standard rights present in bills of rights the world over. Other potential candidates for consultation could include a stronger equality clause[76]; a more extensive right to education; a right to health care free at the point of need[77]; provisions from the Children's Convention[78]; and carers'

---

[72] This phrase originated from the discussion paper published by Labour before they came to power: *Bringing Rights Home*, see note 51, but was complimented by broader aspirations for the HRA prior to September 2001.

[73] All 3 major parties either support the introduction of a Bill of Rights or the Incorporation of the ECHR.

[74] Note 16.

[75] See in particular Dominic Grieve, "Liberty and Community in Britain," *Speech for Conservative Liberty Forum,* 2 October 2006.

[76] ECHR Article 14 is limited to outlawing discrimination in relation to the civil and political rights enshrined in the Convention and does not explicitly include categories like age, disability and sexual orientation, although the interpretation of Article 14 has increasingly included these groups.

[77] Rights to education and health could reflect state obligations that already exist –for example, providing health care at the point of need- but which are 'unprotected' from easy repeal. Polls suggest that such social and economic rights are the most popular candidates for a bill of rights. Following the path of the South African argument, to guard against excessive individualism overriding the public interest, the state could be duty bound only to "progressively realise" economic and social rights that are not already enshrined in law.

[78] The 1990 UN Convention on the Rights of the Child includes recognition of the " rights and *duties* of parents."

and independent living rights from the new UN Convention on the Rights of Persons with Disabilities[79].

As significant as the rights upheld by any bill of rights, is the body selected to be the final arbiter of its broad values[80]. The current 'dialogue model' adopted by the HRA, in which Parliament has the final say, is not one any government is likely to alter significantly to give stronger powers to the courts[81]. Like now, if the 'dialogue model' is to work effectively, the crucial factor is whether parliament and Whitehall address human rights principles in their legislative and policy decisions [82].

The strongest case for consulting on a British Bill of Rights in this period of ongoing debate on our national identity is that we have no equivalent to the American or South African Bills of Rights to turn to at times of national tension.[83]. Yet there has arguably never been a time in modern history where a foundational document is more necessary; a Charter that reinforces the right to choose to be 'different', as well as the bottom line values of fairness, equality and tolerance that are definitive of British democracy[84]. A Bill of Rights can provide a unifying force in a diverse society, as the Conservative Party has suggested, but it will not do this if it ignores the contribution of many countries, and most cultures, to the human rights values recognised throughout the world today[85].

---

[79] See www.un.org/disabilities/convention/

[80] Cameron proposes to semi-entrench a Bill of Rights by amending the Parliament Act so that the House of Commons could not amend or repeal it without the support of the Second Chamber. This seems an innovative idea.

[81] America, Canada, Germany and South Africa all have 'legislative strike down' powers, by contrast.

[82] This is a crucial element of the 'dialogue model' which is dependent on parliamentary select committees and Whitehall officials developing a human rights framework in their policy or scrutiny roles, thereby reducing the likelihood of judicial interventions. See also See *Klug Report, The Committee's Future Working Practices,* Joint Committee on Human Rights HL239; HC1575, para 2.9.

[83] Some commentators propose introducing a Bill of Rights and Responsibilities. E.g. Jonathan Fisher, 'A British Bill of Rights and Obligations', Conservative Liberty Forum, 2006. The responsibilities which flow from rights can be set down in an interpretative preamble to emphasise the normative nature of human rights but very few bills of rights contain legally enforceable duties aimed at individuals. These are contained in a host of other statutes but the essence of bills of rights is to establish those rights to which all are entitled because of our common humanity and which are only limited to protect the rights of others or the wider community, not because some human beings are less 'deserving' than others.

[84] In a speech on "multiculturalism and integration" for the Runnymede Trust on 8 December 2006 the Prime Minister, Tony Blair, spoke of the need to "conform" to "our common values" which he defined as the rule of law, democratic decision-making, and freedom from violence and discrimination.

[85] The UDHR reflects the insights and values of all major religions and cultures and many of these are reflected in the ECHR, in spite of its European designation. South African MP, Professor Kader Asmal, in a speech on the South African Constitution at Chatham House on 10 November 2006, warned that a "shared vision of national identity" could, if based on a "mythical past," rather than the future, bring with it "the

The process of adopting a bill of rights can be as important as the rights themselves. This is an opportunity to return to the unfinished project begun by John Smith. A project he referred to as a "new deal" between "the people and the state." A deal that "gives people new powers and a stronger voice in the affairs of the nation;" one that "restores a sense of cohesion and vitality to our national life.[86]"

Francesca Klug,
Professorial Research Fellow,
LSE Centre for the Study of Human Rights.
December 2006.

With thanks to Helen Wildbore for her meticulous research assistance.

alienation of many immigrants and communities" whose experience belies the "imagining" of a Britain "that has always held dear the values of liberty, tolerance and social justice."

[86] John Smith, *A Citizen's Democracy* p5, Note 14.